SUPREME COURT, U. S.

FILED
APR 7 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1223~~ 83

GROVER C. CROWE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
I. Opinions Below	1
II. Jurisdictional Grounds	1
III. Questions Presented	2
IV. Constitutional Provisions, Etc. Involved in the Case	3
V. Statement of the Case	4
VI. Argument in Support of Petition	7
A. To the Extent That Discretion Reposed in the District Court, That Court Abused It	7
B. In Accepting the Guilty Plea, the Trial Court Failed to Assure Itself That Petitioner Understood the Nature of the Charge	8
C. Guidelines Are Needed	9
D. Conclusion	10
Appendix:	
Judgment of the U. S. Court of Appeals for the Third Circuit	11
Opinion of the U. S. Court of Appeals for the Third Circuit	12
Hearing of May 25, 1965	14

TABLE OF CITATIONS.

Cases:	Page
Gearhart v. U. S., (D. C. Cir. 1959) 272 F. 2d 499	7
Kadwell v. U. S., (9th Cir. 1963) 315 F. 2d 670	7, 8
Poole v. U. S., (D. C. Cir. 1957) 250 F. 2d 396	7
U. S. v. Lester, (2d Cir. 1957) 247 F. 2d 496	7
Code:	
18 U. S. C. A. § 371	4
18 U. S. C. A. § 1341	1, 4
18 U. S. C. A. § 4208(b)	5
18 U. S. C. A. § 4208(c)	5
28 U. S. C. A. § 1254(1)	1
Rules:	
Federal Rules of Criminal Procedure. Rule 32(d)	2, 3, 6, 9
Constitution:	
Amendment VI	3

IN THE

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OCTOBER TERM, 1966.

No.

GROVER C. CROWE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

I. OPINIONS BELOW.

(A) The opinion of the United States Court of Appeals for the Third Circuit bears the date March 9, 1967, is a *Per Curiam* opinion, and is not yet reported. A copy is appended hereto.

(B) The United States District Court for the District of Delaware did not issue a written opinion, but before announcing his decision on May 25, 1965, the District Judge made some remarks in open court which were in the nature of an opinion. They appear at pages 116-123 of the transcript of the hearing of that date, and are appended hereto.

II. JURISDICTIONAL GROUNDS.

This petition seeks a writ of certiorari to the United States Court of Appeals for the Third Circuit with respect to its judgment dated and entered on March 9, 1967, which judgment affirmed the conviction of petitioner in the United States District Court for the District of Delaware of the criminal offense of violating 18 U.S.C.A. § 1341.

Jurisdiction of this Court is predicated upon 62 Stat. 928(1) (28 U. S. C. A. § 1254(1)).

III. QUESTIONS PRESENTED.

A. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO PERMIT PETITIONER TO WITHDRAW HIS PLEA OF GUILTY BEFORE SENTENCE WAS IMPOSED.

B. WHETHER THE DISTRICT COURT ERRED IN REFUSING TO PERMIT PETITIONER TO WITHDRAW HIS PLEA OF GUILTY IN THE LIGHT OF THE CIRCUMSTANCE THAT BEFORE ACCEPTING THE GUILTY PLEA IN THE FIRST INSTANCE THE SAID COURT FAILED TO ASCERTAIN THAT THE DEFENDANT UNDERSTOOD THE NATURE OF THE CHARGE AGAINST HIM.

C. WHETHER THE CIRCUMSTANCES UNDERLYING THE FOREGOING QUESTIONS DO NOT POINT UP THE EXISTENCE OF CONFUSION AND UNCERTAINTY AMONG THE FEDERAL COURTS AS TO THE PROPER GUIDELINES FOR THE APPLICATION OF RULE 32(d), FEDERAL RULES OF CRIMINAL PROCEDURE, WHICH CONFUSION AND UNCERTAINTY OUGHT TO BE RESOLVED BY THE SUPREME COURT.

IV. CONSTITUTIONAL PROVISIONS, ETC. INVOLVED IN THE CASE.

Article VI, Amendments to the Constitution of the United States. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

Federal Rules of Criminal Procedure. Rule 32(d). WITHDRAWAL OF PLEA OF GUILTY. A Motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

V. STATEMENT OF THE CASE.

On May 3, 1963, the United States Grand Jury for the District of Delaware returned an indictment in 32 counts against Grover C. Crowe (petitioner herein) and one William E. Veasey, charging them with certain substantive violations of the Federal Mail Fraud Statute, 18 U. S. C. A. § 1341, and conspiracy to violate the same statute under 18 U. S. C. A. § 371.

On July 30, 1963, before Judge Caleb R. Layton 3rd, the defendant (petitioner) appeared in Court with Counsel and entered pleas of not guilty to each and every count (7/30/63—2).*

On April 27, 1964, the defendants again appeared in Court with their attorneys, who respectively announced to the Court that they desired to make a change of plea. The following exchange ensued (as to Crowe):

> "The Court: You wish to withdraw your prior plea of not guilty to Count IX and to plead guilty to Count IX?
>
> Mr. Ostrov: That is correct.
>
> The Court: Is that your desire also, Mr. Crowe?
>
> Defendant Crowe: Yes, sir.
>
> The Court: Very well. I will have a pre-sentence report made for my information and then there will be a date fixed for the imposition of sentence. * * *" (4/27/64—4)
>
> * * *
>
> "Mr. Lowicki: In light of Mr. Crowe's changing his plea to Count IX, the Government sees no necessity or has no desire for pursuing the trial of the re-

* The date indicates the date of the hearing in the United States District Court for the District of Delaware and the number thereafter represents the page of the transcript of that hearing.

maining counts and will dismiss those counts at sentencing.

We also state at this time that it is our understanding that the change of plea is made without any promises on the part of the Government, any inducements, and that the plea is made freely and voluntarily by the defendant.

The Court: Is that the fact?

Mr. Ostrov: That is the fact.

The Court: And that is the fact, is it, Mr. Crowe? (4/27/64—5)

Defendant Crowe: Yes."

On March 18, 1965, Judge E. D. Steel, Jr. sentenced each defendant, under 18 U. S. C. A. § 4208(b), to a maximum of five years imprisonment and for a study under § 4208(c) (3/18/65—33). However, on March 25, 1965, the same Judge ordered that the sentence be stricken and vacated.

Subsequently, on April 26, 1965 a different attorney, this time a member of the local bar, appeared for petitioner and orally moved that the defendant be permitted to withdraw his plea of guilty to Count IX of the Indictment (4/26/65—2).

On May 3, 1965, petitioner's attorney filed a written motion for leave to withdraw the plea of guilty and that motion was supported by the affidavit of petitioner. In the affidavit petitioner, *inter alia,* denied his guilt. He also stated that his former attorney, Mr. Ostrov, urged him "very strongly to make this change in plea", and told him that his chances of receiving a suspended sentence were "overwhelmingly high." He further stated that he got the impression that a suspended sentence and probation were a "virtual certainty." (See pp. 1-7 of Petitioner's brief in the Court of Appeals.)

As a result of certain *aliunde* contentions made that petitioner's decision was influenced to some extent by statements made to his attorney by the Assistant United States Attorney, a hearing was held on May 25, 1965. At this hearing Mr. Ostrov testified, *inter alia*, that he was told by Mr. Lowicki that it was improbable that the defendant would go to jail (5/25/65—22). Mr. Lowicki took the stand and denied having made this statement (5/25/65—59, 60).

The District Court denied Petitioner's Motion under Rule 32(d) orally in open court, without a written opinion and imposed the sentence noted above (5/25/65—116-123).

VI. ARGUMENT IN SUPPORT OF PETITION.

A. To the Extent That Discretion Reposed in the District Court, That Court Abused It.

The misconception exists among some lawyers that judicial discretion is virtually unreviewable. Actually judicial discretion will be deemed abused whenever it is exercised in a manner not in accord with the legal principles and guidelines which ought to direct it.

It is not necessary that there be any element of the flagrant, the dramatic, or the unconscionable in order to find abuse of judicial discretion, although these factors may of course exist.

The instant case involves a situation where, if precise guidelines are lacking, the governing philosophy has often been expressed by the Courts. This philosophy is, that withdrawal of a guilty plea before sentencing ought to be *freely allowed.*

> *Kadwell v. U. S.,* (9th Cir. 1963) 315 F. 2d 670;
> *Poole v. U. S.,* (D. C. Cir. 1957) 250 F. 2d 396;
> *Gearhart v. U. S.,* (D. C. Cir. 1959) 272 F. 2d 499.

The reason for this is fairly manifest. A defendant who, asserting his innocence and not having previously admitted it except insofar as the guilty plea itself formally imports an admission, is one from whom the court would have been reluctant to accept a plea of guilty in the first place.

> *U. S. v. Lester,* (2d Cir. 1957) 247 F. 2d 496.

Where a defendant seeks to change his plea before sentencing, the inconvenience to the Court, prosecutor and public is slight, if any. After sentencing, other considerations apply which justify the distinction established by the Rule.

A realistic scrutiny of the case at bar makes it fairly obvious that the Court felt constrained to treat the matter

as though the application were made after sentencing, simply because petitioner had fortuitously obtained a preview of his sentence as a result of the abortive attempt to sentence him on March 18, 1965. The Court then sought to escape error by calling it an application made *before* sentencing (which legally, it was) and then taking refuge in judicial discretion to deny the Motion (5/25/65—116).

We do not know the reasoning of the Court of Appeals in affirming, since it wrote no opinion of any consequence.

B. In Accepting the Guilty Plea, the Trial Court Failed to Assure Itself That Petitioner Understood the Nature of the Charge.

In *Kadwell v. U. S., supra,* the Court in emphasizing the importance of the Rule 11 * requirement that the Court assure itself that a defendant understands the meaning of the charge before accepting a plea of guilty, said (at p. 669):

> "The court in the present case determined only that the appellant's guilty plea is voluntary. The court did not determine whether the plea was made with understanding of 'the nature of the charge'; i.e. the court took no steps to satisfy itself that the appellant understood 'the *meaning* of the charge, and what acts amounted to being guilty of the charge, and the *consequences* of pleading guilty thereto."

At the hearing on May 25, 1965 prior to sentencing, petitioner denied that he was guilty of any fraud, and displayed a lack of understanding of the elements of the Mail Fraud Statute. The petitioner described himself as "technically guilty" but nowhere does it appear that he under-

* Rule 11 provides: "A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. The court may refuse to accept the plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with the understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

stood just what this consisted of. His very use of the expression suggests confusion (5/25/65—110). We would be indulging in mere surmise if we supposed petitioner to have meant that he did something which would have been a crime had it been accompanied by criminal intent, for the record does not even justify attributing to him that much legal understanding.

In addition to any other questions presented, the case involves a failure to comply with Rule 11.

C. Guidelines Are Needed.

The principle that withdrawal of a guilty plea before sentencing should be "freely allowed" has the virtue of being emphatic but the infirmity of not being precise. It is something like the exhortation to "give generously."

It would seem that the lower courts did violence to the spirit and intent of this rule by anyone's definition. However, the District Court and Court of Appeals were unaided by clear guidelines in this area, which if they had existed, would have been helpful.

Since a positive criticism is more useful than a negative one, petitioner will here presume to suggest guidelines calculated to make the application of Rule 32(d) simpler, more uniform, and more just. Petitioner does not suggest that there are no other possible guidelines, but respectfully addresses these to the consideration of the Court, being not unmindful, of course, that whatever other merits they possess, they have the added merit (from his point of view), that their application should have brought about a different result in his case.

Petitioner suggests that an application to withdraw a plea of guilty before sentencing should be granted unless (1) it is frivolous; or (2) to permit it would prejudice the Government, in the legal sense, in the absence of overriding considerations. It should be mentioned in passing that these guidelines are applicable only where the plea of guilty was properly received in the first place; where it was not its

withdrawal would stand on other grounds and the guidelines would be unnecessary.

An example of a frivolous application might be one not accompanied by an explicit denial of guilt, or one made in the face of a previous voluntary and explicit admission of facts which constitute guilt of the crime charged.

An example of an application which would prejudice the Government might be a case where an indispensable government witness dies between the entry of a plea of guilty and sentencing, whereupon the defendant seeks to take advantage of this circumstance by changing his plea to not guilty. Even such a situation might not necessarily be regarded as true prejudice, since the government might not be able to show that it could have scheduled the case for trial prior to the loss of its witness even if the plea had been not guilty in the first place.

It is not suggested that these examples are exhaustive, but it is urged that under these or any reasonable guidelines petitioner should have been permitted to change his plea, and that it was error and/or an abuse of discretion on the part of the lower courts to refuse to let him do so.

D. Conclusion.

It is respectfully submitted that the petition for certiorari be granted and the judgment of the lower court be reversed.

Respectfully submitted,

JOHN MERWIN BADER,
Attorney for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15453

UNITED STATES OF AMERICA

v.

GROVER C. CROWE AND
WILLIAM E. VEASEY,

GROVER C. CROWE,

Appellant.

(D. C. CRIMINAL No. 1546)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: SMITH and SEITZ, *Circuit Judges,* and JOSEPH S. LORD, III, *District Judge.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 1, 1965, be, and the same is hereby affirmed.

ATTEST: THOMAS F. QUINN,
Clerk.

March 9, 1967.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15453

UNITED STATES OF AMERICA,
Appellee,

v.

GROVER C. CROWE,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued February 16, 1967

Before SMITH and SEITZ, *Circuit Judges,* and JOSEPH S. LORD III, *District Judge.*

OPINION OF THE COURT.

(Filed March 9, 1967)

PER CURIAM.

The appellant and another were named as defendants in a multiple count indictment. The first count charged them with conspiracy to violate the postal laws, 18 U. S. C. A., § 371, and each of the other counts charged them with the use of the mails in a scheme to defraud, 18 U. S. C. A., § 1341. They were arraigned on July 30, 1963, at which time they entered pleas of not guilty. When the indictment was moved for trial, on April 27, 1964, the appellant, repre-

sented by counsel, applied to the Court for leave to withdraw his earlier plea of not guilty to the ninth count and to enter a plea of guilty. Leave was granted and the guilty plea was accepted.

On March 18, 1965, the appellant was ordered committed for study and sentenced under § 4208(b) of Title 18 U. S. C. A., the sentence to commence on April 5. When sentence was imposed the Court was under the mistaken impression that the appellant had entered a plea of guilty to the charge of conspiracy and sentenced him accordingly. When the mistake was discovered several days later the sentence was vacated and the appellant was ordered to appear before the Court on April 26, 1965. The appellant, represented by a second attorney, appeared as ordered and moved under rule 32(d) of the Fed. Rules Cr. Proc., 18 U. S. C. A., for leave to withdraw his plea of guilty and to reinstate his plea of not guilty. This motion was later reduced to writing.

After a full evidentiary hearing during which the Court thoroughly explored the grounds urged in support of the motion, it was denied. The appellant was again ordered committed for study and sentenced under 4208(b) *supra*. The present appeal is from the denial of the motion made under rule 32(d) *supra*. We have examined the record and find no reversible error. *United States v. Washington*, 341 F. 2d 277, 281 (3rd Cir. 1965), cert. den. 382 U. S. 850; *United States v. Sammara*, 330 F. 2d 1 (3rd Cir. 1964).

The judgment of the court below will be affirmed.

HEARING OF MAY 25, 1965.

(116)

The Court: Let me say at the outset: There is a little difference between the parties as to which portion of Criminal Rule 32-D is applicable, it being the contention of the Defendant that the application which is before me is an application prior to sentence whereas the Government contends that the application before me is one after sentence.

In view of the order which was entered earlier in the case, which in effect declared the earlier attempt to sentence Mr. Crowe to be abortive and a nullity, I consider the application to be one which is made prior to sentence, and that the burden is on the Government to show why the plea should not be vacated and a substitute plea of not guilty entered.

Now, the record shows this history:

(117)

The indictment came down in May of '63. On July 30, 1963, Mr. Crowe appeared in open Court with Counsel, Mr. Ostrov, and pleaded not guilty. April 27th was set for the trial, and on that day, Mr. Crowe appeared in open Court with Mr. Ostrov again and asked for leave to withdraw his plea of not guilty and to plead guilty; and leave was granted, and a plea of guilty was entered at that time.

On March 18, 1965, Mr. Crowe appeared in Court, again with Mr. Ostrov, for sentencing.

At the time, I stated that the sentence was applicable to Count 9, and it was only Count 9 to which the plea of guilty had been entered, and it was a conspiracy, a count to violate the mail fraud statute. In that, I was in error, because the count in question was a substantive count.

Now, on the basis of that erroneous assumption, I purported to impose sentence under 18 USC, Section 4208(B) which required Mr. Crowe to go to jail for a study and recommendations as to what the future should be.

I realized, a day or two after sentence was imposed, that there had been the error which I had mentioned.

An order was then entered vacating what purported to be the sentence and declaring it to be a mullity.

In the meantime, I had received a letter from Mr. Ostrov, telling me of a desire of Mr. Crowe to change his

(118)

plea again to one of not guilty and to substitute an attorney.

On May 3, 1965, a formal application, to change the plea from guilty to not guilty was filed by Mr. Bader, Mr. Crowe's new attorney.

The grounds of the motion are twofold, that the plea of guilty was entered reluctantly and with the assurance of his then attorney that he, Mr. Crowe, was virtually certain of receiving a suspended sentence.

The second ground is that for practical reasons, concerning the uncertaintly and expense of trial, but despite the fact that he had no feeling of conscious guilt, the plea of guilty was entered.

Now, the hearing which has just been had indicates that the only matter which is entitled to very much consideration arose out of a conference between Mr. Ostrov and Mr. Lowicki and Mr. Weir of the United States Attorney Assistants on April 23, 1965, at which time Mr. Ostrov discussed with the United States Attorneys the possibility of withdrawing a plea of not guilty to all of the counts and substituting a plea of guilty to Count 9. And obviously, Mr. Ostrov attempted to evaluate or apprise himself of what type of sentencing risks would be run.

The record shows what it shows in that connection. But probably the strongest evidence which might be said to

(119)

have been adduced on behalf of Mr. Crowe yesterday, or this morning, was Mr. Ostrov's testimony that Mr. Lowicki

said that it would be highly improbable that his client would go to jail, and that the Judge was discussed, and his reluctance to send people to jail, as compared perhaps with the disposition of other judges in that connection.

Now, that testimony was denied by Mr. Lowicki, and I must say I have had before me a member of the bar of this state and a member of the bar of New Jersey, each of which is in good standing, and I can understand how after a lapse of a year perhaps memories have dimmed sufficiently to justify the difference in testimony that there was, and we don't propose to discredit one and credit the other in this area. I don't think it is necessary, in view of what I am about to say.

It is quite clear that during the discussions Mr. Ostrov understood that any sentence which would be imposed would be the Judge's decision, and that no deal of any kind had been made which involved either his client or the United States Attorney's office or the Judge himself. He understood there would be no recommendation as to sentence by the United States Attorney; and that there would be no guaranty as to the type of sentence which might be imposed, and he understood that there was a risk involved of his client going

(120)

to jail. He thought that his client was guilty under the facts as he understood them; and that it was in the interest of his client to make the recommendation to his client to plead guilty.

Now, Mr. Ostrov said that that was a judgment, professional judgment, which was based in part on the conversation he had with the United States Attorney General, based in part on prior decisions that he had read, based on the fact that Mr. Crowe had had no prior record, and based broadly on his experience as a practitioner in matters of this kind; so that the recommendation was made, and it was understood by Mr. Crowe to entail risks; that there

were no guarantees; that there was to be no recommendation by the United States Attorney of any kind.

Now, then, when the plea of July '63 was changed, when the plea of not guilty was changed to guilty, Mr. Lowicki made the statement, which previously appears in the record: "We also state at this time it is our understanding that the change of plea is made without any promises on the part of the Government, any inducements, and that the plea is made freely and voluntarily by the Defendant.

"The Court: Is that the fact?

"Mr. Ostrov: That is the fact.

"The Court: That is the fact, is it, Mr. Crowe?

(121)

"Defendant Crowe: Yes."

When Mr. Ostrov was on the stand yesterday, I asked him the same question again, whether it was the fact that the plea had been entered without any promises, any inducements, and whether it was made freely and voluntarily; and Mr. Ostrov affirmed what he had said on April 27 of '64, when the guilty plea was entered.

Now, it seems to me that this matter of influence by the Government not only is answered very forcibly by what was said in open Court on April 27, 1964, which was only a few days after the conference had taken place, which I believe was on April 23, '64, between the United States Attorneys and Mr. Ostrov.

In addition to that, the motion itself contains no ground of inducement, referring to inducement or representations by the Government; and while I have heard testimony in that area, it seems to me that the limitations in the motion are entitled to some weight in evaluating the matter; although I have considered the testimony just as though the motion were of a broader kind.

Now, the law has been laid down in several cases in this Circuit. And I have had those cases in mind in the disposition which I am going to make of this matter.

In United States against Colonna, 142 Fed., Second,

(122)

210, decided in 1944, the Judge said: "If the Defendant knew and understood what was being done, and there was not present any circumstances of force, mistake, misapprehension, fear, inadvertence, or ignorance of his rights, and understanding of the consequences of the plea, then there should be no withdrawal of the plea."

In this case, I find that there was not present any circumstances of force, mistake, misapprehension, fear, inadvertence, or ignorance of Mr. Crowe's rights, and understanding of the consequences of the plea at the time when it was entered.

Another case which merits consideration is United States against Fox, 133rd Second, 56, decided by the Third Circuit in 1942, where Judge Goodrich in quoting from another decision, quoted these words from the other decision: "It is not error to refuse leave to withdraw the plea if the Defendant fully understood his rights, the nature of the charge against him, and the consequences of such plea."

An earlier case, in which, for reasons not here germane, it was held to be error not to permit a Defendant to change a plea of guilty to not guilty, is Camarota against United States, reported in 2 Fed. Second, 650, decided in 1924 by the Third Circuit.

Now, that was a case where a plea of guilty had

(123)

been entered upon the United States Attorney's representation that it would make a recommendation that a light sentence be imposed. And such a recommendation was made. Judge Woolley said: "We do not think that Camarota

would have been entitled to change his plea upon discovering that the trial court was not going to act upon the recommendation of the United States Attorney and impose upon him a light sentence under the count to which he pleaded.

It seems to me it is a much stronger case than probably we have here.

So that it is my judgment and determination that the motion of the Defendant to withdraw his plea of guilty to Count 9 of the indictment and substitute in lieu thereof—Let me start that again. It is my determination that the application of the Defendan to be permitted to withdraw his plea of guilty to Count 9 of the indictment and substitute in lieu thereof a plea of not guilty, is denied.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1233

GROVER C. CROWE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 12–13) is reported at 373 F. 2d 797.

JURISDICTION

The judgment of the court of appeals (Pet App. 11) was entered on March 9, 1967. The petition for a writ of certiorari was filed on April 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in denying leave to withdraw a plea of guilty.

265-238—67

RULE INVOLVED

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

On April 27, 1964, in the United States District Court for the District of Delaware, petitioner pleaded guilty to one substantive count of a 32-count indictment charging conspiracy and substantive violations of the mail fraud statute (18 U.S.C. 1341). A sentence imposed on March 18, 1965, was ordered vacated on March 25 because the court, at the time of pronouncement, had inadvertently referred to the substantive count in question as a conspiracy charge. At the date set for resentencing, on April 26, 1965, petitioner moved to withdraw his plea of guilty. After a hearing on May 25 and 26, 1965, the motion was denied. On June 1, 1965, petitioner was sentenced, pursuant to 18 U.S.C. 4208(b), to imprisonment for five years subject to modification after a study prescribed by 18 U.S.C. 4208(c). The court of appeals affirmed *per curiam*.

The record shows that the indictment was returned on May 3, 1963, and that petitioner retained counsel, Mr. Ostrov, immediately thereafter (Tr. May 25, 1965,

p. 15). On July 30, 1963, petitioner entered a plea of not guilty. Trial was set for April 27, 1964. On April 23, 1964, petitioner appeared before the court with counsel for a pre-trial conference at which there was an extensive discussion of the construction of the indictment, the production of records, the character of the evidence and the defense and other matters (Tr. April 23, 1964).

On April 27, 1964, petitioner appeared with counsel who informed the court that petitioner desired leave to change his plea. The following transpired (Pet. 4–5):

> The COURT: You wish to withdraw your prior plea of not guilty to Count IX and to plead guilty to Count IX?
>
> Mr. OSTROV: That is correct.
>
> The COURT: Is that your desire also, Mr. Crowe?
>
> Defendant CROWE: Yes, sir.
>
> The COURT: Very well. I will have a presentence report made for my information and then there will be a date fixed for the imposition of sentence. * * *
>
> * * * * * *
>
> Mr. LOWICKI [Assistant United States Attorney]: In light of Mr. Crowe's changing his plea to Count IX, the Government sees no necessity or has no desire for pursuing the trial of the remaining counts and will dismiss those counts at sentencing.
>
> We also state at this time that it is our understanding that the change of plea is made without any promises on the part of the Government, any inducements, and that the plea is made freely and voluntarily by the defendant.

The COURT: Is that the fact?

Mr. OSTROV: That is the fact.

The COURT: And that is the fact, is it, Mr. Crowe?

Defendant CROWE. Yes.

On March 18, 1965, a hearing on sentencing was held at which Mr. Ostrov argued for leniency. He explained that petitioner, in selling at auction items obtained from suppliers upon the representation that they were to be used as premiums to promote his sewing machines business, did not attempt initially to defraud but that the bad business practice developed to the point that "it actually violated the statute" (App. p. 6b).[1] Petitioner's co-defendant testified that he and petitioner sold items at auction even though they represented to sellers that the items were to be given away as premiums (Tr. March 18, 1965, pp. 28–29). Petitioner admitted the auction sales and argued that his only mistake was in adopting this practice without notifying the suppliers (*ibid.*, pp. 12, 31–32). The court imposed a sentence of five years' imprisonment subject to modification after a study pursuant to 18 U.S.C. 4208(c), observing that, despite petitioner's protestations, he stood convicted of a serious crime and that his record showed that he had been identified over a long period of years with other business ventures causing substantial loss to the public (*ibid.*, pp. 32, 33). In that connection the court mistakenly referred to petitioner's conviction as for con-

[1] "App." refers to the appendix of the appellee in the court below.

spiracy rather than the substantive offense. Because of that fact, the sentence was vacated on March 25, 1965, and petitioner brougth back for resentencing on April 26, 1965.

At the hearing called for resentencing, petitioner appeared with new counsel, Mr. Bader, and applied for permission to withdraw the plea of guilty (Tr. April 26, 1965, p. 2). Mr. Bader said that he was satisfied that petitioner, "in the strict legal sense," entered the plea knowingly and willingly and that he had no contentions to make with respect to misunderstanding or inducement (*ibid.*, pp. 3, 9). He felt "rather certain," however, that the plea had been entered in light of an expectation, "transmitted" to petitioner by counsel for both sides, that a sentence of probation was probable (*ibid.*, p. 6). He explained that he had no reason to conclude that anyone had given petitioner an absolute assurance that he would get probation, but that his thinking was based upon the consideration that he, as an experienced attorney, would have told a defendant in similar circumstances that there was a strong probability of a suspended sentence (*ibid.*, pp. 7, 8). He believed that petitioner's feeling that he would receive a sentence of probation was a product of his own "wishful thinking and not of anything that he was told categorically" by his own attorney or government counsel (*ibid.*, p. 8), and that petitioner, with full knowledge of the possible penalties, had entered the plea for "practical reasons" having to do with the expense and strain attendant on a lengthy trial and the uncertainty of the outcome (*ibid.*, pp. 10–12). Petitioner expressly affirmed these representations by

counsel (*ibid.*, p. 15). The court requested that counsel file a formal motion with supporting affidavits and set the matter down for further hearing (*ibid.*, pp. 17, 18).

At a hearing held on May 25, 1965, Mr. Bader urged that the motion should be considered as one made prior to sentence in view of the court's vacation of initial sentence (Tr. May 25, 1965, p. 2). In support of the motion it was contended that the plea had been entered on the assurance of petitioner's counsel, Mr. Ostrov, that petitioner was "virtually certain" of receiving a suspended sentence, that the plea was prompted by practical considerations of the expense and uncertainties of a trial, and that petitioner was not guilty (*ibid.*, p. 3). Mr. Ostrov testified that petitioner entered the plea freely, with knowledge of what he was doing, and without promises or inducements from the government (*ibid.*, pp. 41–42, 49). Mr. Ostrov had thought such course advisable after evaluating all the circumstances of the case, his conversations with government counsel, his knowledge of petitioner's previous record, petitioner's financial condition and other factors (*ibid.*, p. 22). He had told petitioner that he thought there was a good possibility of a suspended sentence, but he did not say, or imply, that this was a certainty (*ibid.*, p. 54). On the contrary, he had advised petitioner of the hazards of such course, told him that sentence was solely in the province of the court, and that government counsel had indicated it would make no recommendation as to sentence (*ibid.*, pp. 22, 23). Assistant United States Attorney Lowicki had remarked to Mr. Ostrov that the sentencing court

had a great deal of compassion for defendants and that it was highly improbable that his client would go to jail (*ibid.*, p. 34).

Petitioner testified that he had never talked to government counsel except in the presence of his own counsel. In pleading guilty he had weighed all the possibilities and the final determination was his. He knew the matter of sentence was for the court and he had recognized the risk involved (*ibid.*, pp. 110–113). In explaining his admission to Mr. Ostrov that he was "technically guilty," he said that he had meant to convey the notion that he never intended fraud of any kind (*ibid.*, p. 110).

ARGUMENT

On this record, it is clear that petitioner's plea of guilty was knowingly entered after consultation with counsel, as the product of petitioner's reasoned choice, without any promises and with full knowledge on petitioner's part of his guilt of the offense with which he was charged. It is also clear that petitioner was in fact guilty; the mere claim of good faith could not alter the admitted fact that petitioner knew he sold at auction items which he represented were to be given away as premiums. Although the court treated the motion to withdraw the plea as one made before sentence, since the sentence first imposed had been vacated, it seems evident that the motion was prompted by petitioner's disappointment upon discovering that he would not be granted probation. At the time the plea was entered, almost a year before the first sentence, the government had been prepared

to go to trial with some fifty witnesses and numerous records (see Tr. April 26, 1965, p. 23). Under these circumstances, the denial of the motion was well within the discretion of the district court. *United States* v. *Ptomey,* 366 F. 2d 759 (C.A. 3); *United States* v. *Washington,* 341 F. 2d 277, 281 (C.A. 3), certiorari denied *sub nom. De Gregory* v. *United States,* 382 U.S. 850; *United States* v. *Hughes,* 325 F. 2d 789 (C.A. 2), certiorari denied, 377 U.S. 907; *Zaffarano* v. *United States,* 330 F. 2d 114 (C.A. 9), certiorari denied, 379 U.S. 825. See also *Nagelberg* v. *United States,* 377 U.S. 266.

Petitioner's present contention that his plea should have been vacated because the district court did not comply with Rule 11, F.R. Crim. P., is without merit. Petitioner had been present at a lengthy pre-trial conference at which the charges were fully discussed. When the guilty plea was subsequently entered petitioner had been represented by his retained counsel for almost a year. The court thus had good reason to believe that the plea had been fully discussed by petitioner and counsel, as indeed it had been; and petitioner signified to the court that the plea was his own desire. It was a matter of record that no promises had been made. The record at the hearing on the motion to withdraw the plea subsequently confirmed what was implicit on the original record—that the guilty plea was entered knowingly and voluntarily.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967